

UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
REGION 9

TRUCK DRIVERS, CHAUFFEURS AND HELPERS,
LOCAL UNION NO. 100, AFFILIATED WITH THE
INTERNATIONAL BROTHERHOOD OF TEAMSTERS
(Tea Shop Productions LLC d/b/a The Foundation)

and

Case 09-CB-249487

SAMUEL J. BUCALO, AN INDIVIDUAL

COUNSEL FOR THE GENERAL COUNSEL'S BRIEF
TO THE
ADMINISTRATIVE LAW JUDGE

I. INTRODUCTION

This matter is before Administrative Law Judge Melissa Olivero upon the General Counsel's July 8, 2020 Amended Complaint and Notice of Hearing. The amended complaint alleges that Respondent referred employees to employment contrary to its own hiring hall rules and for reasons other than the failure to tender periodic dues and the initiation fees uniformly required for membership in Respondent in violation of Section 8(b)(1)(A) of the Act. The amended complaint also alleges that Respondent caused an employer to discriminate against its employees in violation of 8(a)(3) of the Act, thus violating Section 8(b)(2) of the Act. The case was heard on September 21, 2020 by Zoom video conference.

II. FACTS ^{1/}

Truck Drivers, Chauffeurs and Helpers, Local Union No. 100, Affiliated with the International Brotherhood of Teamsters (hereinafter Respondent) operated an exclusive hiring hall to refer employees for work in the movie industry. (Tr. 35) Movie work can be very

^{1/} References to the transcript will be designated as (Tr. __); General Counsel's Exhibits will be designated as (G.C. Ex. __); Respondent's Exhibits will be designated as (Resp. Ex. __).

lucrative for drivers referred from Respondent's hiring hall as the drivers work a large number of hours in a short period of time . (Tr. 35-36; G.C. Ex. 9) Drivers typically work 10 to 16 hours per day on these projects. (Tr. 61) Craig Metzger has served as Respondent's "Transportation Captain" since 2013. (Tr. 32) One of Metzger's roles as transportation captain was to call drivers registered with the hiring call to inquire of whether they wanted to work a given project. (Tr. 34)

In May of 2018, Respondent adopted its "Movie Industry Referral Procedure and Rules." (Tr. 38-39; G.C. Ex. 2) These rules established criteria by which Respondent placed employees desiring work in the movie industry in one of seven prioritized groups for referral to work on movie projects. (G.C. Ex. 2) Respondent's referral rules gave highest priority to drivers residing in certain counties by placing them in one of its top three referral groups (placement within those three top groups was based upon each driver's years of experience and number of film productions worked). ^{2/} Drivers living outside the designated counties were to be placed in 4, 5 or 6, with a seventh group reserved for drivers receiving pension or retirement benefits. (G.C. Ex. 2) Drivers residing in Montgomery County, Ohio were not to be placed in groups 1, 2 or 3, pursuant to Respondent's rules. (G.C. Ex. 2)

On June 26, 2018, Respondent issued a letter to its drivers explaining the new rules and sending them applications to fill out so that they could be placed in the appropriate groups. (G.C. Exs. 3 and 4) The letter informed the drivers that filling out the applications would enable the transportation captain to place them in the appropriate groups. (Tr. 63; G.C. Ex. 3) The applications included a line on the top of the first page for the driver to indicate his or her county

^{2/} Adams, Brown, Butler, Clermont, Clinton, Hamilton, Highland, Pike, Scioto and Warren Counties in Ohio; Boone, Campbell and Kenton Counties in Kentucky; and Dearborn, Franklin, Ohio, Ripley and Switzerland Counties in Indiana.

of residence. (G.C. Ex. 4) The purpose of this line was to determine whether drivers should be placed in groups 1-3 or 4-6. (Tr. 41)

July 30-31, 2018 a trial was held in Case 09-CB-214166 involving allegations that Respondent had committed violations involving the operation of movie industry hiring hall at issue herein (based on a complaint issued April 30, 2018). On September 11, 2018, Judge Gollin issued his decision finding that Respondent committed unfair labor practices as alleged.^{3/}

On August 21, 2018, January 15, 2019 and July 23, 2019, Teaven Curtiss, Aaron Robinson and Billee Duty, respectively, submitted applications to Respondent so that they could be placed in the appropriate groups for referral to movie work. (G.C. Exs. 6, 7 and 8) Curtiss, Robinson and Duty all prominently wrote on their applications that they resided in Montgomery County, Ohio. (G.C. Exs. 6, 7 and 8) Additionally, all three clearly indicated that they had no previous movie experience. (G.C. Exs. 6, 7 and 8) Accordingly, all three should have been placed in Referral Group 6, per Respondent's rules then in effect. (G.C. Ex. 2)

Although the driver application forms, on their face, call for the Transportation Captain to assign the drivers to the appropriate group, Respondent assigned Administrative Assistant Sarah McFarland to place the drivers in the appropriate groups. (Tr. 104-108, 115; G.C. Exs. 4, 6, 7 and 8) McFarland is one of only two clerical employees employed by Respondent, which has approximately 4700 members who work for about 60 different employers. (Tr. 110) Despite this, neither Metzger nor anyone else checked McFarland's work to ensure that the drivers were placed in the correct movie referral groups. (Tr. 48, 53, 108) Indeed, Metzger did not even look at the applications or play any role in compiling the lists of drivers for referral to movie work.

^{3/} On September 1, 2020, the Board affirmed this decision. *Truck Drivers, Chauffeurs and Helpers Local Union Number 100 (Wicked Films, LLC)*, 370 NLRB No. 15.

(Tr. 72, 80) McFarland admittedly placed Curtiss, Robinson and Duty in Referral Group 3 instead of Referral Group 6 where they should have been. (Tr. 104-108)

On August 26 and 27, 2019, an administrative trial was held in Case 09-CB-232458, also involving allegations that Respondent had committed violations involving the operation of the same hiring hall for movie industry work that is at issue herein (based on a complaint issued June 13, 2019). On October 24, 2019, Judge Amchan issued his decision finding that Respondent committed unfair labor practices as alleged.

On August 28, 2019, Respondent entered into an agreement with Employer Tea Shop Productions, LLC d/b/a The Foundation (the Employer) where the parties agreed that Respondent would be the exclusive source of referrals of employees for employment with the Employer for purposes of filming a movie called *Wrong Turn*. (Tr. 54-55; G.C. Exs. 9, 1(t) and (v))

When it came time to staff the project with the Employer, Metzger went down the list created by McFarland. (Tr. 58-59; G.C. Exs. 5 and 10) Because Curtiss and Robinson were incorrectly placed in Group 3, both were called and offered work on the project. (Tr. 58-59, G.C. Ex. 10) Curtiss rejected the work but Robinson accepted the assignment and worked it. (Tr. 58-59; G.C. Ex. 10) Because of this, other drivers who were rightfully placed in Groups 3, 4 and 5 were not called or given the opportunity to work the project. (Tr. 59; G.C. Exs. 5 and 10) These drivers not only missed out on the opportunity to perform lucrative work in the film industry, they also were denied the opportunity to move up the list for higher priority for referral to future film work since Respondent's rules give priority to drivers based, in part, on their experience in the industry. (G.C. Ex. 2)

III. LEGAL ANALYSIS

A union that operates a hiring hall must represent all individuals seeking to utilize that hall in a fair and impartial manner. The Board has held that “any departure from established exclusive hiring hall procedures which results in a denial of employment to an applicant . . . inherently encourages union membership, breaches the duty of fair representation owed to all hiring hall users, and violates Sections 8(b)(1)(A) and (b)(2),” absent a legitimate justification. *Plumbers Local 342 (Contra Costa Electric)*, 336 NLRB 549, 552 (2001), *enfd.* 325 F.3d 301 (D.C. Cir. 2003). The Board has held that “such departures encourage union membership by signaling the union's power to affect the livelihoods of all hiring hall users, and thus restrain and coerce applicants in the exercise of their Section 7 rights.” *Plumbers Local 342*, *supra* at 550. After the General Counsel proves that a union has departed from established hiring hall procedures, a violation is established unless the union comes forward with rebuttal evidence that the departure was justified based on a valid union-security clause or is necessary to the effective performance of the union's representative function. *Plumbers Local 342* at 553 fn. 10. A union's inadvertent mistake in operating a hiring hall arising from mere negligence does not violate Section 8(b)(1)(A) and (2). *Plumbers Local 342*, *supra* at 550. Gross negligence in the management of a hiring hall, however, does violate the Act. *IBEW Local 48 (Oregon-Columbia Chapter of NECA)*, 342 NLRB, 101, 108-109 (2004).

In *IBEW Local 48*, the Board stated that gross negligence in the operation of a hiring hall is “conduct indicating disregard for established procedures”. *Id.* Relevant considerations are “the kind of mistakes committed and the ease with which they might have been avoided.” *Id.* In assessing whether the improper referrals at issue in *IBEW Local 48* rose to the level of gross negligence, the Board noted that the collective-bargaining agreement set forth specific eligibility

rules for registering for work through the hiring hall and that the hiring hall rules were readily available in the union office. Id. Thus, had the union taken a reasonable amount of care, the incorrect referrals at issue in that matter could have been avoided.

In the instant case, Respondent concedes that it improperly referred Aaron Robinson ahead of other drivers on its referral list. As such, it impliedly concedes that the General Counsel has established a violation unless the Union comes forward with rebuttal evidence establishing that the departure was justified based on a valid union-security clause, was necessary to the effective performance of the union's representative function or was an inadvertent mistake arising from mere negligence. Respondent argues that the referral of Robinson ahead of other drivers who should have been ahead of him in line per the hiring hall rules then in effect was an inadvertent mistake arising from mere negligence. To the contrary, Board precedent dictates that this referral constitutes gross negligence.

Initially, the instant case must be viewed in a larger context of other violations committed by Respondent. Significantly, at the time of Robinson's referral to work for the Employer Administrative Law Judges Gollin and Amchan had both held trials involving the same hiring hall and Judge Gollin had issued his decision finding that Respondent committed unfair labor practices in its operation of the hall. Thus, Respondent was well aware that its operation of the hiring hall at issue in this matter had been and was likely to be under continuing scrutiny by the Labor Board. Despite this, and contrary to indications on the application forms and cover letters sent to the drivers that they were to be assigned their groups by the transportation captain, Respondent chose to delegate this task to an overworked clerical employee – without any system in place to check that her work was accurate.

Further, as was the case in *IBEW Local 48*, the improper referral at issue in this matter could have been easily avoided simply by virtue of reading the hiring hall referral rules and comparing those rules to the applications of the drivers for movie work. Although there are many criteria that Respondent could have chosen to rely upon in deciding how to refer drivers from its hiring hall for movie work, Respondent chose to make the driver's county of residence the single most important criterion. Having so chosen, Respondent was obligated to make a reasonable effort to place drivers in the appropriate referral groups that their counties of residence dictated, including implementing a system to avoid costly errors such as those at issue herein. Although only one improper referral is at issue in this case, it is significant that Respondent placed three drivers from Montgomery County in the wrong referral group.

Respondent's failure to follow its own rules or to implement a system, particularly given the high stakes to the drivers and when viewed in conjunction with the egregiousness of the error in an environment where it knew its actions were under scrutiny by the Labor Board, must lead to a conclusion that its actions amounted to at least gross negligence.

Finally, it is of no consequence that the Union changed its hiring hall procedures after the facts giving rise to the instant case. In contrast to the Union's claim, this does not render the allegations of the complaint moot – although their identities have not been definitively ascertained, there are discriminatees who lost out on lucrative work due to the Union's mismanagement of its hiring hall as alleged in the complaint for this matter. Additionally, because Respondent's rules also gave higher priority for referral to drivers with more experience in the industry, a driver or drivers were denied the opportunity to gain movie experience that ultimately would have resulted in them moving higher up on the referral list.

IV. PROPOSED CONCLUSIONS OF LAW

For the reasons discussed above, Counsel for the General Counsel respectfully requests that the Administrative Law Judge find that Respondent violated Sections 8(b)(1)(A) and 8(b)(2) of the Act as alleged in the complaint. The recommended conclusions of law are set forth below:

1. Tea Shop Productions LLC d/b/a The Foundation (the Employer) is an employer engaged in commerce within the meaning of Section 2(6) and 2(7) of the Act.
2. Truck Drivers, Chauffeurs and Helpers, Local Union No. 100, affiliated with the International Brotherhood of Teamsters (Respondent) is a labor organization within the meaning of Section 2(5) of the Act.
3. Respondent violated Section 8(b)(1)(A) of the Act by referring an employee to employment with the Employer about September 5, 2019 contrary to the rules of Respondent's exclusive hiring hall.
4. By referring an employee to the Employer contrary to the rules of Respondent's exclusive hiring hall, Respondent caused the Employer to discriminate against its employees in violation of Section 8(a)(3) of the Act in violation of Section 8(b)(2) of the Act.
5. The above unfair labor practices affect commerce within the meaning of Section 2(6) and (7) of the Act

V. PROPOSED REMEDY

Counsel for the General Counsel seeks, among other things, an Order requiring Respondent to reimburse and otherwise make whole any and all employees who would have been referred to work with the Employer but for Respondent's unlawful actions. Additionally, General Counsel seeks an order requiring Respondent to update its records so that any drivers who would have been referred to work with the Employer, but for Respondent's unlawful actions, are credited

with working the Wrong Turn project for purposes of future referrals. Counsel for the General Counsel additionally seeks an order requiring Respondent to post a notice advising employees of their rights under Section 7 of the Act (attached as Attachment A) and to distribute the notice to employees by e-mail and/or intranet posting if Respondent customarily communicates with employees in this manner. Finally, Counsel for the General Counsel seeks all other relief as may be just and proper to remedy the unfair labor practices alleged.

VI. PROPOSED ORDER

Truck Drivers, Chauffeurs and Helpers Local Union No. 100, affiliated with the International Brotherhood of Teamsters (Union), Cincinnati, Ohio, its officers, agents, successors, and assigns, shall

1. Cease and desist from

- (a) Failing or refusing to refer individuals through its exclusive referral system contrary to its own hiring hall rules and for reasons other than the failure to tender periodic dues and the initiation fees uniformly required for membership in Respondent.

- (b) Causing or attempting to cause an employer that is signatory to a collective-bargaining agreement to discriminatorily fail to employ an individual for reasons other than failure to tender periodic dues and initiation fees uniformly required for membership in the Union.

- (c) In any like or related manner interfering with, restraining, or coercing employees in the exercise of the rights guaranteed them by Section 7 of the Act.

2. Take the following affirmative action necessary to effectuate the policies of the Act:

(a) Within 14 days from the date of the Board's Order, make whole any individuals who were denied work as a result of the unfair labor practices found in this matter for any loss of earnings and other benefits suffered as a result of those unfair labor practices.

(b) Within 14 days, credit any employees who were denied work as a result of the unfair labor practices in this matter with having worked the *Wrong Turn* project for purposes of future referrals and, within 3 days thereafter, notify them in writing that this has been done and that the failure to work the *Wrong Turn* project will not be used against them in any way, including in response to any inquiry from any employer, employment agency, unemployment insurance office, or reference seeker.

(c) Within 21 days of the Board's order, file a report allocating backpay to the appropriate calendar years with the Regional Director for Region 9. The Regional Director will then assume responsibility for transmission of the report to the Social Security Administration at the appropriate time and in the appropriate manner.

(d) Compensate any and all impacted employees for the adverse tax consequences, if any, of receiving one or more lump-sum backpay awards covering periods longer than 1 year.

(e) Within 14 days after service by the Region, post at its facility in Cincinnati, Ohio copies of the proposed notice. Copies of the notice, on forms provided by the Regional Director for Region 9, after being signed by the Union's authorized representative, shall be posted by the Union and maintained for 60 consecutive days in conspicuous places including all places where notices to employees/members are customarily posted. In addition to physical posting of paper notices, the notices shall be distributed electronically, such as by email, posting on an intranet or an internet site, and/or other electronic means, if the Union customarily communicates with its employees/members by such means. Reasonable steps shall be taken by the Union to ensure that

the notices are not altered, defaced, or covered by any other material. In the event that, during the pendency of these proceedings, the Union has gone out of business or closed the facility involved in these proceedings, the Union shall duplicate and mail, at its own expense, a copy of the notice to all current and former members of the Union and current and former employees employed by the Employer at any time since August 28, 2019.

(f) Within 21 days after service by the Region, file with the Regional Director a sworn certification of a responsible official on a form provided by the Region attesting to the steps that the Union has taken to comply.

Attached hereto as Attachment A is a proposed Notice to Employees for your consideration.

Dated: October 26, 2020

Respectfully submitted,

/s/ Jonathan D. Duffey

Jonathan D. Duffey, Counsel for the General Counsel
Region 9, National Labor Relations Board
Room 3-111, John Weld Peck Federal Building
550 Main Street
Cincinnati, Ohio 45202-3271

Proposed Notice

THE NATIONAL LABOR RELATIONS ACT GIVES YOU THE RIGHT TO:

- Form, join, or assist a union;
- Choose a representative to bargain with your employer on your behalf;
- Act together with other employees for your benefit and protection;
- Choose not to engage in any of these protected activities.

WE WILL NOT do anything to prevent you from exercising the above rights.

WE WILL NOT operate our Film and TV referral list in an arbitrary or discriminatory manner by referring misclassified drivers.

WE WILL NOT in any like or related manner, restrain or coerce you in the exercise of the rights guaranteed you by Section 7 of the Act.

WE WILL operate our exclusive hiring hall for Film and TV work by using written, objective criteria and standards when making referrals.

WE WILL reimburse those members who suffered loss of work on the Wrong Turn film production because we improperly operated our exclusive hiring hall.

WE WILL credit those members who suffered loss of work on the Wrong Turn film production because we improperly operated our exclusive hiring hall with having worked the Wrong Turn film for purposes of future referrals for movie work.

**TRUCK DRIVERS CHAUFFEURS AND HELPERS
LOCAL UNION NO. 100, AFFILIATED WITH THE
INTERNATIONAL BROTHERHOOD OF
TEAMSTERS**

(Labor Organization)

Dated

:

By:

(Representative)

(Title)

The National Labor Relations Board is an independent Federal agency created in 1935 to enforce the National Labor Relations Act. We conduct secret-ballot elections to determine whether employees want union representation and we investigate and remedy unfair labor practices by employers and unions. To find out more about your rights under the Act and how to file a charge or election petition, you may speak confidentially to any agent with the Board's Regional Office set forth below or you may call the Board's toll-free number 1-844-762-NLRB

(1-844-762-6572). Hearing impaired callers who wish to speak to an Agency representative should contact the Federal Relay Service (link is external) by visiting its website at <https://www.federalrelay.us/tty> (link is external), calling one of its toll free numbers and asking its Communications Assistant to call our toll free number at 1-844-762-NLRB.

550 MAIN ST
RM 3-111
CINCINNATI, OH 45202-3271

Telephone: (513)684-3686
Hours of Operation: 8:30 a.m. to 5 p.m.

THIS IS AN OFFICIAL NOTICE AND MUST NOT BE DEFACED BY ANYONE

This notice must remain posted for 60 consecutive days from the date of posting and must not be altered, defaced or covered by any other material. Any questions concerning this notice or compliance with its provisions may be directed to the above Regional Office's Compliance Officer.

CERTIFICATE OF SERVICE

October 26, 2020

I hereby certify that I served the attached Counsel for the General Counsel's Brief to the Administrative Law Judge on all parties by electronic mail and regular mail at the following addresses:

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/s/ Jonathan D. Duffey

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